Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO GROWTHWORKS CANADIAN FUND LTD.
(the "APPLICANT")

FACTUM OF ALLEN-VANGUARD CORPORATION

(Cross-Motion Re: Allen-Vanguard Mini-Trial, returnable February 11, 2014)

February 5, 2014

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PART I - OVERVIEW

1. Growthworks' cross-motion for an order bifurcating the trial of the Allen-Vanguard Proceedings and restricting the evidence available to the Court should be dismissed. There is no free standing jurisdiction to order a "mini-trial" of certain liability issues in an action and not others.

2. If a bifurcation is to be ordered, the Court should direct an expedited trial of all liability issues in the Allen-Vanguard Proceedings. The unchallenged evidence before the Court is that all liability issues in this case are ready for trial and that trial would take approximately 6-7 weeks to complete.

3. The self-serving mini-trial procedure proposed by Growthworks and the other Offeree Shareholders would unjustifiably:

(a) increase the costs of the litigation;

(b) restrict the parties' rights of appeal;

(c) prevent the Court from hearing and weighing important evidence;

(d) invite interlocutory and mini-trial skirmishes related to issues of admissibility and privilege;

(e) risk inconsistent findings when overlapping issues are subsequently tried;

(f) further delay the final adjudication of the Allen-Vanguard Proceedings; and

(g) effect an unfairness upon Allen-Vanguard.

4. The main issue that Growthworks and the other Offeree Shareholders seek to have adjudicated at the proposed mini-trial concerns the interpretation of some unspecified provisions of the Share Purchase Agreement.

5. It is a fundamental principle of contract interpretation that the agreement must be read as a whole and in the context of the circumstances as they existed when the agreement was created. The Court of Appeal has clearly articulated the proper approach to contractual interpretation:

> The scope of the surrounding circumstances to be considered will vary from case to case but generally will encompass those factors which assist the court "... to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract." Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co., [1980] 1. S.C.R. 888 at 901.
>
> Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.[1]

6. The indemnification provisions of the Share Purchase Agreement cannot be divorced from the balance of the contract or the surrounding factual matrix, all of which needs to be assessed on any trial of this action. If there is a mini-trial, then this will have to be done again on the second trial which will still have to proceed, whatever the result of the mini-trial. The trial on the remaining issues necessarily again involves the interpretation of the Share Purchase Agreement.

7. Moreover, Master MacLeod and Regional Senior Justice Hackland have reviewed the Share Purchase Agreement and determined that the indemnification provisions are at least

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[1] *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 at paras. 26-27 (C.A.), Brief of Authorities of Allen-Vanguard Corporation dated February 5, 2014 ("Authorities"), Tab 1.

somewhat ambiguous. The Offeree Shareholders nevertheless continue to insist that there is no ambiguity.

8. Yet in their undefined and "expected" evidence, the Offeree Shareholders state that they will file affidavits from lawyers and others as to their intentions during the negotiation of the Share Purchase Agreement, evidence that would never be admitted in the usual case. Even their own proposed evidence appears to admit that there may be some ambiguity in the Share Purchase Agreement.

9. Just by way of example, if evidence of the lawyers' intentions is admitted for some purposes, then Allen-Vanguard will want to cross-examine these lawyers as to other interrelated provisions in the Share Purchase Agreement, a right that will be denied to the Plaintiff if this trial proceeds in two stages.

10. In any case when there is an issue of parol evidence or ambiguity, all the evidence must be considered by one trier of fact, in order to avoid error or an injustice. As Justice Steele, the trial judge in *Kentucky Fried Chicken*, held:

> At the conclusion of argument, subject to any further order, I reserved my decision until the end of trial. I stated that until I had heard all of the factual evidence I believed that it was premature to give a decision, even if I was so inclined, no matter how desirable it might have been to shorten the trial ... I stated that by reserving the decision, all of the evidence would be available for consideration by me at the end of the trial and, in the event that I should err in my conclusion, by an appellate court. The risk of an erroneous ruling on blanket areas of evidence is far greater than a ruling on an isolated question. The admission of evidence can create no harm.[2]

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[2] *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.*, [1997] O.J. No. 3773 at para. 12 (Gen. Div.), Authorities, Tab 1.

11. The question whether the Offeree Shareholders are to be held liable under the terms of the Share Purchase Agreement for the fraudulent conduct of MES in an amount *in excess* of the Indemnification Escrow Amount, cannot be separated from the question which will need to be determined on the second trial as to whether the Offeree Shareholders are to be held liable to Allen-Vanguard for the fraudulent misrepresentations and breaches of representations, warranties and covenants committed by MES *up to* the Indemnification Escrow Amount.

12. In other words, the same principles of contractual interpretation will necessarily be engaged in the second trial and will necessarily require the same witnesses to testify again, the same and other provisions of the Share Purchase Agreement will need to be considered and reconsidered, the costs will double, and there is a significant risk of inconsistent findings.

13. The mini-trial proposed by the Offeree Shareholders seeks to limit the number of witnesses, the scope of their evidence, and preclude testimony from witnesses who would otherwise appear in the usual course of a trial.

14. The Offeree Shareholders' proposal would exclude the evidence of Paul Timmis and the other former management of MES on the mini-trial, notwithstanding that it is they who are alleged to have made fraudulent misrepresentations on behalf of MES at the very time that Allen-Vanguard was negotiating the indemnification provisions of the Share Purchase Agreement with MES and the Offeree Shareholders.

15. The Offeree Shareholders completely ignore that Mr. Timmis' involvement is intertwined with all of the issues in the Allen-Vanguard Proceedings and that this Court, for that reason, has already specifically ordered that the Timmis action (Court File No. 08-CV-41899) be tried together with the actions involving the Offeree Shareholders.

16. Whatever the result, there will likely be an appeal, which will proceed on a partial record (and on an unfair CCAA procedural path) and which will add to delays and cost, all to the detriment of Allen-Vanguard and the administration of justice.

17. It is not in the interests of justice to allow Growthworks and the other Offeree Shareholders to bifurcate the trial in the manner they seek. Accordingly, Growthworks' cross-motion should be dismissed and this Court should make an Order directing an expedited trial of all liability issues.

PART II - SUMMARY OF FACTS

EVIDENCE OF THE OFFEREE SHAREHOLDERS' LIABILITY FOR FRAUD CANNOT BE SEPARATED FROM OTHER LIABILITY ISSUES

18. All of the evidence relating to the negotiation of the Share Purchase Agreement is bound up and intertwined with the evidence relating to the alleged fraudulent conduct.

19. Although the Offeree Shareholders assert in their Factum that "Allen-Vanguard has not alleged that Med-Eng or the Offeree Shareholders acted fraudulently with respect to the negotiation of the SPA",[3] this is not correct.

20. Allen-Vanguard's allegation that the former management of MES committed fraud on behalf of MES is inextricably intertwined with the negotiation of the Share Purchase Agreement. Allen-Vanguard's pleadings specifically allege that:

> The Offeree Shareholders relied on MES to make representations to Allen-Vanguard to induce Allen-Vanguard to purchase their shares in MES. Having relied upon MES to effect the sale of the Offeree Shareholders' shares in MES and by taking the benefit of any proceeds associated with the sale, they are in

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[3] Factum of the Offeree Shareholders dated January 31, 2014, para. 31.

> law responsible for the breaches of representations and warranties and fraudulent misrepresentations committed by MES.[4]

21. The evidence in support of that pleading has been fully and repeatedly canvassed in the 31 days of discovery that have been conducted in the actions involving the Offeree Shareholders to date.[5] It has also been formally particularized by Allen-Vanguard in its Response to the Offeree Shareholders' Demand for Particulars:

> Paul Timmis, Danny Osadca and Blair Geddes were the individuals at MES who withheld the disclosure with the intention to induce Allen-Vanguard to complete the transaction. These individuals were aware that Allen-Vanguard was relying upon the representations made with respect to the continuation of the existing arrangement with the USMC and that the pipeline of orders with the USMC represented a critical element of Allen-Vanguard's valuation of MES, the purchase price it was willing to pay to acquire MES, and whether it was willing to acquire MES at all.[6]
>
> Paul Timmis, Danny Osadca and Blair Geddes were the individuals at MES who intended to deceive Allen-Vanguard and who were reckless as to the truth or accuracy of their statements, and did deceive Allen-Vanguard.[7]

22. The unchallenged evidence on this motion from David E. Luxton, who was the principal negotiator and executive in charge of the Transaction on behalf of Allen-Vanguard,[8] is as follows:

> Quite apart from the legal maneuvering that the Offeree Shareholders are now attempting through the proposed mini-trial, I do not see how specific provisions of the Share Purchase Agreement can be interpreted without considering the surrounding factual circumstances, which include the fraud that Allen-Vanguard says was being perpetrated against it at the very same time that it was negotiating and executing the Share Purchase Agreement with the Offeree Shareholders.

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[4] Reply of Allen-Vanguard dated August 22, 2013, para. 20, Motion Record of Allen-Vanguard, p. 360.

[5] Affidavit of David E. Luxton sworn October 28, 2013 ("First Luxton Affidavit"), paras. 29-30, Motion Record of Allen-Vanguard Corporation dated October 28, 2013 ("Motion Record of Allen-Vanguard"), pp. 16-18.

[6] Response to Demand for Particulars of Allen-Vanguard dated May 15, 2013, para. 16, Motion Record of Allen-Vanguard, p. 312.

[7] Response to Demand for Particulars of Allen-Vanguard dated May 15, 2013, para. 17, Motion Record of Allen-Vanguard, pp. 312-313.

[8] Affidavit of David E. Luxton sworn December 10, 2013 ("Second Luxton Affidavit"), para. 3, Responding Motion Record of Allen-Vanguard Corporation dated December 10, 2013 ("Responding Motion Record of Allen-Vanguard"), p. 1.

> Indeed, while the Share Purchase Agreement was being negotiated, I believe the former management of MES were misrepresenting the strength of the company's position to Allen-Vanguard and withholding vital information with respect to MES' most important product and its largest customer.
>
> The former management of MES knew that MES' largest customer was intending to conduct a head-to-head test of MES' Electronic Counter Measure Chameleon unit (which is an electronic device also referred to as a "jammer") against units produced by MES' competitors. This intention to test on a head-to-head basis was known by MES management to have material implications for its existing arrangements with the customer and the future supply of units to this customer.
>
> Allen-Vanguard alleges the former management of MES intentionally or recklessly withheld this critical information from Allen-Vanguard. In fact, while the Share Purchase Agreement was being negotiated, they represented that there was a significantly increased probability of securing further orders from this customer. I can see no basis for any such representation.
>
> Allen-Vanguard never agreed (and would never agree) to contract out of making a claim for fraud. On the contrary, while Allen-Vanguard was prepared to limit its claims to the Indemnification Escrow Amount for MES' breaches of specified representations and warranties contained in the Share Purchase Agreement, it did not, and would never, limit its claim against the Offeree Shareholders in the event of a fraud.[9]

23. MES was itself a party to the Share Purchase Agreement, which was signed by Mr. Osadca on behalf of MES.[10] Section 1.01 of the Share Purchase Agreement also includes the following definition of "knowledge":

> **"knowledge"** means with respect to [MES], the actual knowledge of any of Danny Osadca, President and Chief Executive Officer, Blair Geddes, Chief Financial Officer and Secretary, and Paul Timmis, Vice President, Electronic Systems.[11]

24. The evidence with respect to the interpretation of the Share Purchase Agreement necessarily requires the testimony of the former management of MES. Allen-Vanguard has alleged that they fraudulently induced it to enter into the Share Purchase Agreement for the benefit of the Offeree Shareholders (and for which the Offeree Shareholders are liable). The evidence of

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[9] Second Luxton Affidavit, paras. 18-22, Responding Motion Record of Allen-Vanguard, pp. 4-5.

[10] Share Purchase Agreement, Section 8.15, Motion Record of Allen-Vanguard, p. 79.

[11] Share Purchase Agreement, Section 1.01, Motion Record of Allen-Vanguard, p. 32.

fraud which was being perpetrated at the very same time that the Share Purchase Agreement was being negotiated is highly probative and critical to the interpretation of the Share Purchase Agreement and to the factual matrix and intentions of the parties.

25. Nevertheless, the mini-trial proposed by the Offeree Shareholders contemplates filing affidavits of only three individuals, none of whom are the former management of MES and are the ones alleged to have committed the fraud on behalf of MES at the time that Allen-Vanguard negotiated and executed the Share Purchase Agreement with MES and the Offeree Shareholders.

26. The Offeree Shareholders have not even addressed the fact that the evidence of Paul Timmis (an obviously necessary witness in all aspects of the liability issues) would be shielded from the proposed mini-trial.

27. Not only did Mr. Timmis negotiate a retention bonus for himself in connection with the Transaction in the amount of $5 million on closing with an additional $19 million to be received upon the fulfilment of certain terms and conditions,[12] but it was Mr. Timmis' discovery evidence which precipitated the amendments to Allen-Vanguard's Statement of Claim that increased the amount claimed from $40 million to $650 million:

> The affidavit evidence is to the effect that the decision to amend the claim was made after the discovery of Mr. Timmis. The plaintiff believes that evidence given by Mr. Timmis is an admission of material misrepresentation and non disclosure concerning amongst other things knowledge that the U.S. military was proposing "head to head tests" between the Med Eng product and the products of competitors. In other words **the affidavit explains why Allen Vanguard now believes it has stronger evidence of fraudulent misrepresentation... encouraged by the discovery evidence and believing it has a better chance of**

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[12] First Luxton Affidavit, para. 19, Motion Record of Allen-Vanguard, p. 14.

> **success, the plaintiff has reconsidered its upside on damages and now wants to "go for broke".**[13] [Emphasis added]

28. The Court has acknowledged that the issues in the Timmis action (Court File No. 08-CV-41899), are intertwined and inter-connected with the actions involving the Offeree Shareholders, and for that reason, it ordered that the Timmis action must be tried together with all Allen-Vanguard Proceedings.[14]

29. It would appear that the Offeree Shareholders are attempting to secure an unfair advantage by proposing a mini-trial which would specifically preclude Mr. Timmis from testifying on key issues relating to the factual circumstances which led to the execution of the Share Purchase Agreement. The Court should not permit the Offeree Shareholders to pursue a mini-trial in such circumstances, nor should it permit a procedure which would deprive the Court from hearing necessary evidence which is directly relevant to the issue which the Offeree Shareholders wish to submit to a mini-trial for summary adjudication.

30. In any event, there are numerous, interrelated provisions of the Share Purchase Agreement that will need to be carefully considered by the Court in order to interpret the contract as a whole. The pleadings of Allen-Vanguard and the Offeree Shareholders in Court File Nos. 08-CV-43544 and 08-CV-43188 specifically refer to 30 interconnected provisions of the Share Purchase Agreement that must be reviewed by the Court in order to adjudicate the liability issues in the Allen-Vanguard Proceedings.[15] It makes no sense to adjudicate those issues in piecemeal fashion, as would be the case under the mini-trial proposed by Growthworks and the other Offeree Shareholders.

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[13] *Allen-Vanguard Corp. v. L'Abbé*, [2013] O.J. No. 1074 at para. 24 (S.C.J. Mast.), Authorities, Tab 2.
[14] First Luxton Affidavit, para. 27, Motion Record of Allen-Vanguard, p. 16.
[15] Second Luxton Affidavit, para. 25, Responding Motion Record of Allen-Vanguard, pp. 6-7.

THE ISSUES FOR THE PROPOSED MINI-TRIAL

(i) The Contractual Interpretation Issue

31. The amendments to Allen-Vanguard's Statement of Claim were not "game-changing" as Growthworks has alleged in its Factum,[16] other than to increase the potential exposure of the Offeree Shareholders. The Offeree Shareholders have always taken the position that they are not liable under the terms of the Share Purchase Agreement and the Escrow Agreement,[17] and nothing contained in the amendments changes the nature of the dispute.

32. The Offeree Shareholders submit that Allen-Vanguard has sued the wrong party – they insist that Allen-Vanguard must sue MES (the company that Allen-Vanguard purchased and subsequently amalgamated with, and from which there could be no possible recovery).

33. Allen-Vanguard's response to this argument is clearly set out in its Reply:

> The terms of the Share Purchase Agreement and Escrow Agreement provide that Allen-Vanguard's claims are to be asserted against the Offeree Shareholders. This is what was agreed to by the parties, is consistent with the structure of the transaction and reflects the parties' intentions.
>
> To suggest that Allen-Vanguard must assert its claims against MES (and thereby sue the entity it was purchasing, and now itself) is commercially absurd, not supported by the transaction documents and was not intended by the parties.
>
> Pursuant to the terms of the Share Purchase Agreement and Escrow Agreement, Allen-Vanguard was entitled to deliver a Notice of Claim for the Indemnification Escrow Amount, provided that it did so before December 21, 2008. The Escrow Agreement expressly provides that the Notice of Claim is to be served on the Offeree Shareholders and the Escrow Agent. It is not to be served on MES.
>
> "Claims" is defined in section 1.1 of the Escrow Agreement as follows:

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[16] Factum of Growthworks dated January 31, 2014, para. 80.

[17] Amended Statement of Defence of the Offeree Shareholders, paras. 15-16, Motion Record of Allen-Vanguard, pp. 326-327.

> **1.1 Definitions**
>
> **"Claims"** means **all losses, damages, expenses, liabilities** (whether accrued, actual, contingent, latent or otherwise), claims and demands of whatever nature or kind including all reasonable legal fees and disbursements incurred by [Allen-Vanguard] **directly or indirectly resulting from any breach of any covenant of the Corporation** or any Shareholder contained in the Share Purchase Agreement **or from any inaccuracy or misrepresentation in any representation or warranty of the Corporation set forth in Section 3.01 of the Share Purchase Agreement** or of any Shareholder set out in Section 3.02 or in a certificate delivered pursuant to Section 5.01(b) of the Share Purchase Agreement.
>
> [Emphasis added]
>
> Allen-Vanguard's Claims are not intended to be asserted against MES, but rather against the Offeree Shareholders for any losses or damages **resulting from** a breach or misrepresentation committed by MES.
>
> Further, only the Offeree Shareholders are entitled to deliver a Notice of Objection to the Claim. MES has no right to object. The Agreements reflect the commercial reality that MES was the purchased entity, now owned by Allen-Vanguard, and subsequent claims were to be asserted against the Offeree Shareholders.[18]

34. The Offeree Shareholders describe certain provisions of the Share Purchase Agreement in their Factum which they rely upon in support of their interpretation of the contract. However, their Factum omits several of the key provisions and, most importantly, never addresses the commercial absurdity of their position.

35. Article 7.02 of the Share Purchase Agreement provides that it is the "Corporation" (i.e. MES) which is indemnifying Allen-Vanguard from and against all Claims incurred by Allen-Vanguard directly or indirectly resulting from a breach of the representations, warranties and covenants of MES contained in the Share Purchase Agreement.

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[18] Reply of Allen-Vanguard dated August 22, 2013, paras. 5-10, Motion Record of Allen-Vanguard, pp. 357-358.

36. Although Article 7 of the Share Purchase Agreement was structured in a particular way to benefit the Offeree Shareholders for commercial purposes, claims for fraud were expressly excluded. Master MacLeod recognized this:

> The clear intent of Article 7 is to limit any liability of the offeree shareholders and to limit any remedy by Allen Vanguard to a claim against the escrow fund. There are however exceptions for fraud.[19]

37. Article 7.02 provides as follows:

> 7.02 **Indemnification by the Corporation**
>
> (1) Subject to the provisions of this Article 7, the Corporation will indemnify and save harmless the Purchaser and the directors, officers, employees and agents of the Purchaser (collectively, the "Purchaser Indemnitees") from and against all Claims incurred by the Purchaser directly or indirectly resulting from (i) any breach of any covenant by the Corporation contained in this Agreement, (ii) any inaccuracy or misrepresentation in any representation or warranty of the Corporation set forth in Section 3.01 or (iii) the contravention of, non-compliance with or other breach, on or before the Closing Date, by the Corporation or its Affiliates of the Teaming Agreement ("GD Teaming Agreement") between General Dynamics Armament and Technical Products ("GD") and the Corporation dated May 27, 2005, as amended.
>
> (2) Notwithstanding any of the other provisions of this Agreement, **the Corporation will not be liable to any Purchaser Indemnitee** in respect of:
>
> (a) any representation and warranty of the Corporation set forth in Section 3.01 or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement unless any claim or demand by the Purchaser against the Corporation with respect thereto is given to the Corporation and the Offeree Shareholders by the Purchaser prior to December 21, 2008, **except in the case of fraud, in which case there will be no time limit for the Purchaser to make a demand or claim against the Corporation** in respect thereof; **or**
>
> (b) any inaccuracy or misrepresentation in any representation or warranty set forth in Section 3.01 or any contravention of, non-compliance with or other breach, on or before the Closing Date, of the GD Teaming Agreement:

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[19] *Allen-Vanguard Corp. v. L'Abbé*, [2013] O.J. No. 1074 at para. 8 (S.C.J. Mast.), Authorities, Tab 2.

> (i) unless and until the aggregate of all Claims exceeds $4.0 million, and then only to the extent that such aggregate exceeds $2.0 million; **or**
>
> (ii) **in excess of the Indemnification Escrow Amount**;
>
> **other than, in all cases, any Claim attributable to fraud.**[20]
>
> [Emphasis added]

38. Pursuant to Article 7.02(2)(a), MES is not to be held liable to Allen-Vanguard in respect of any breach of representations, warranties or covenants of MES, unless Allen-Vanguard makes a claim by December 21, 2008, **except in the case of fraud**. Master MacLeod has explained that Article 7.02(2) "clearly anticipates that if the plaintiff can show fraud, it will not be limited to the amount in the escrow fund."[21]

39. Regional Senior Justice Hackland has also explained as follows:

> the waiver or limitation of claims in Article 7.02 itself contains the limitation "other than those [remedies] arising with respect to any fraud". As the Master observed, this limitation does not itself create a right of action against the offeree shareholders. **It is less than clear what the exclusion of fraud from Article 7.02 actually means. This may be a matter for parol evidence at trial.** The Master held that he was unable to find only one possible interpretation of the contract and accordingly could not definitively say that the proposed amendment was untenable.[22] [Emphasis added]

40. The Offeree Shareholders argue that a fraud claim against them must be in respect of a fraud committed by the particular Shareholder, not MES.

41. However, such an interpretation is illogical and inconsistent with the intention of the parties and is inconsistent with other provisions of Article 7, which effectively provide that the

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[20] Share Purchase Agreement, Arts. 7.01 and 7.02, Motion Record of Allen-Vanguard, pp. 68-69.
[21] *Allen-Vanguard Corp. v. L'Abbé*, [2013] O.J. No. 1074 at para. 21 (S.C.J. Mast.), Authorities, Tab 2.
[22] *Allen-Vanguard v. L'Abbé*, [2013] O.J. No. 2324 at para. 6 (S.C.J.), Authorities, Tab 3.

Offeree Shareholders are to indemnify Allen-Vanguard for MES' breaches of representations, warranties and covenants and for MES' fraud.

42. If one were to accept the Offeree Shareholders' interpretation of Article 7.02, Allen-Vanguard, as the new owner of MES, would be obliged to indemnify itself for MES' breaches of representations and warranties and for MES' fraudulent conduct. This cannot have been intended by the parties. It makes no sense, commercial or otherwise. Allen-Vanguard could not practically make a claim "against the Corporation" it just purchased for breaches of representations or warranties or for fraud.

43. The language in Article 7.02(2)(b), "other than, in all cases, any Claim attributable to fraud", must be given a commercially sensible meaning, in harmony with the rest of the Share Purchase Agreement. It must be interpreted to mean that if MES has committed a fraud, then the Offeree Shareholders are liable to indemnify Allen-Vanguard for such fraud and there is no monetary limit associated with the fraud claims.

44. The Offeree Shareholders have admitted the following allegation in their Amended Statement of Defence:

> Allen-Vanguard is entitled to deliver a Notice of Claim for the Indemnification Escrow Amount at any time, provided that it does so before December 21, 2008. However, **in the event that Allen-Vanguard has a claim for fraud, there is no temporal or monetary limitation to making such a claim.**[23]
>
> [Emphasis added]

45. This interpretation is also supported by the language of Article 7.07, which provides as follows:

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[23] Amended Statement of Defence of the Offeree Shareholders, para. 1, Motion Record of Allen-Vanguard, p. 317; Amended Statement of Claim of Allen-Vanguard, para. 12, Motion Record of Allen-Vanguard, p. 280.

> 7.07 **Adjustment to Purchase Price**
>
> **All amounts payable by the Corporation or the Shareholders to a Purchaser Indemnitee pursuant to Article 7 will be deemed to be a decrease to the Purchase Price.** All amounts payable by the Purchaser to a Shareholder Indemnitee pursuant to Article 7 will be deemed to be an increase to the Purchase Price.[24] [Emphasis added]

46. Article 7.07 necessarily requires the Offeree Shareholders (on behalf of all MES shareholders) to indemnify Allen-Vanguard for any Claims it has against MES for breaches of representations and warranties and for fraudulent misrepresentations. It provides that any amount payable by MES under the indemnification provisions of Article 7 (which includes any claim for fraud) is deemed to be a decrease to the purchase price. In effect, this amounts to indemnification by the Offeree Shareholders, as the purchase price was paid to them (on behalf of all Shareholders).

47. Likewise, Article 7.06[25] provides that Allen-Vanguard's sole recourse is to the Indemnification Escrow Amount for MES' breaches of representations, warranties or covenants under the Agreement, **except for fraud**.

48. In addition, and in any event, pursuant to Article 8.10 of the Share Purchase Agreement, all of Allen-Vanguard's rights and remedies under the Share Purchase Agreement are in addition to and not in substitution for, any other rights and remedies available at law or in equity or otherwise.[26]

49. The language of the Share Purchase Agreement, taken as a whole, can have only one commercially reasonable meaning: the Offeree Shareholders are to indemnify Allen-Vanguard out

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[24] Share Purchase Agreement, Art. 7.07, Motion Record of Allen-Vanguard, pp. 71-71.
[25] Share Purchase Agreement, Art. 7.06, Motion Record of Allen-Vanguard, p. 71.
[26] Share Purchase Agreement, Art. 8.10, Motion Record of Allen-Vanguard, p. 76.

of the Indemnification Escrow Amount for breaches of the specified representations and warranties up to $40 million and for a greater amount in cases of fraud, to be accounted for as a reduction in the purchase price.

50. After considering these provisions of the Share Purchase Agreement, both Master MacLeod and Regional Senior Justice Hackland concluded that the indemnification provisions of the Share Purchase Agreement are at least somewhat ambiguous. The trial judge will therefore likely need to hear parol evidence at trial with respect to the surrounding circumstances and the intentions of the parties to the contract (i.e. Allen-Vanguard, the Offeree Shareholders and MES).

51. The Offeree Shareholders nonetheless insist that the Share Purchase Agreement is not ambiguous[27] and that its interpretation can be determined on a paper record alone.[28]

52. Only Allen-Vanguard has put forward actual sworn evidence on the main issue for the proposed mini-trial.

53. The Offeree Shareholders have effectively put forward "will say" statements contained in an Affidavit.[29] This "expected" evidence is apparently to come from only three individuals:

(a) Robert Chapman, a lawyer at McCarthy Tétrault who acted for both the Offeree Shareholders and MES (the company purchased by and subsequently amalgamated with Allen-Vanguard) with respect to the Transaction;[30]

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[27] Factum of the Offeree Shareholders dated January 31, 2014, para. 24.
[28] Factum of the Offeree Shareholders dated January 31, 2014, para. 57.
[29] Affidavit of Paul Echenberg sworn November 24, 2013, paras. 15-19, Cross-Motion Record of Growthworks, pp. 22-25.
[30] Affidavit of Paul Echenberg sworn November 24, 2013, para. 16, Cross-Motion Record of Growthworks, p. 22.

(b) Cécile Ducharme, a representative of the Schroders entities[31] that have been directing the litigation on behalf of all Offeree Shareholders since the outset;[32] and

(c) Paul Echenberg, another representative of the Schroders entities.[33]

54. The "expected" evidence from Mr. Chapman, Ms. Ducharme and Mr. Echenberg is entirely silent as to the issue of fraud. Their "expected" evidence is to the effect that the Offeree Shareholders would not have agreed to indemnify Allen-Vanguard for breaches of representations and warranties given by MES beyond that which was secured by the Indemnification Escrow Amount.

55. This unsworn, "expected" evidence from the Offeree Shareholders does not refute Mr. Luxton's sworn testimony that "while Allen-Vanguard was prepared to limit its claims to the Indemnification Escrow Amount for MES' breaches of specified representations and warranties contained in the Share Purchase Agreement, it did not, and would never, limit its claim against the Offeree Shareholders in the event of a fraud."[34]

56. It is noteworthy that the Offeree Shareholders seek to exclude evidence from all of the following sources:

(a) Paul Timmis, who stood to benefit in the amount of over $24 million in connection with the Transaction and whose evidence precipitated the amendments to Allen-Vanguard's Statement of Claim;

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[31] Affidavit of Paul Echenberg sworn November 24, 2013, para. 18, Cross-Motion Record of Growthworks, p. 24.
[32] First Luxton Affidavit, para. 56(e), Motion Record of Allen-Vanguard, p. 25.
[33] Affidavit of Paul Echenberg sworn November 24, 2013, paras. 1-2 and 19, Cross-Motion Record of Growthworks, pp. 18 and 24-25.
[34] Second Luxton Affidavit, para. 22, Responding Motion Record of Allen-Vanguard, p. 5.

(b) a representative of Growthworks (even though Growthworks characterizes Allen-Vanguard's claim as "utterly baseless"[35] and "ill-fated"[36]in its Factum);

(c) Richard L'Abbé (another Offeree Shareholder who held approximately 21% of the shares of MES at the time of the Transaction[37] and who received, along with his holding company, proceeds totalling over $120 million);

(d) the former management of MES, despite the fact that MES was a party to the Share Purchase Agreement;[38] or

(e) any expert witness.

57. This attempt by Growthworks and the other Offeree Shareholders' to control not only the issues to be decided, but also the evidence before the Court is unfair and prejudicial to Allen-Vanguard.

(ii) The Amalgamation Issue

58. The argument advanced by the Offeree Shareholders that Allen-Vanguard's subsequent amalgamation with MES in 2011 has somehow extinguished Allen-Vanguard's claim is simply another way of putting their contractual interpretation argument. In short, the Offeree Shareholders argue that Allen-Vanguard's claims are "intercompany claims" [39] and that Allen-Vanguard's only remedy is to sue MES (the company it purchased and later amalgamated with).

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[35] Factum of Growthworks dated January 31, 2014, para. 68.
[36] Factum of Growthworks dated January 31, 2014, para. 80.
[37] First Luxton Affidavit, para. 7, Motion Record of Allen-Vanguard, p. 12.
[38] Second Luxton Affidavit, para. 28, Responding Motion Record of Allen-Vanguard, p. 8.
[39] Amended Statement of Defence of the Offeree Shareholders, para. 23, Motion Record of Allen-Vanguard, p. 329.

59. Allen-Vanguard's claims are not "intercompany claims"[40] as alleged by the Offeree Shareholders – they are made against the vendors of MES (i.e. the Offeree Shareholders who received the proceeds from the Transaction and benefitted from the breaches of representations and warranties and fraudulent misrepresentations committed by MES).

60. The argument that the subsequent amalgamation of MES following the closing of the Transaction extinguished Allen-Vanguard's claims makes no commercial sense because it would:

(a) require Allen-Vanguard to claim against MES (the wholly-owned subsidiary company which it purchased pursuant to the terms of the Share Purchase Agreement and from which there could be no recovery);

(b) prevent Allen-Vanguard from completing any corporate reorganization involving MES until its claim was finally resolved; and

(c) create a circumstance in which Allen-Vanguard could inadvertently extinguish a claim (which, in the case of fraud, the Offeree Shareholders admit has no temporal limitation[41]) before discovering that such a claim even existed.

(iii) The CCAA Release Issue

61. Allen-Vanguard has alleged that it spiraled into insolvency in the months following the Transaction as a result of MES' misrepresentations and breaches of representations, warranties and covenants.[42]

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[40] Amended Statement of Defence of the Offeree Shareholders, para. 23, Motion Record of Allen-Vanguard, p. 329.
[41] Amended Statement of Defence of the Offeree Shareholders, para. 1, Motion Record of Allen-Vanguard, p. 317; Amended Statement of Claim of Allen-Vanguard, para. 12, Motion Record of Allen-Vanguard, p. 280.

62. Although it has never been pleaded, the Offeree Shareholders' new position, more than four years after the fact, is apparently that the Sanction Order made by Justice Campbell on December 16, 2009[43] actually releases the Offeree Shareholders from Allen-Vanguard's claims.

63. It is also unclear whether the Offeree Shareholders are now taking the position that both their action and the interrelated Timmis action have therefore also been released by the Sanction Order, notwithstanding that they have been continuing to litigate their claims against Allen-Vanguard for more than four years since the Sanction Order was issued. The Sanction Order does not operate to bar Allen-Vanguard's claims against the Offeree Shareholders.

64. The Court should not accept such "hail mary" arguments being thrown into the proposed mini-trial at the eleventh hour. The trial of the liability issues in this case should not be subverted to a mini-trial based on a collection of frivolous defences now being asserted by the Offeree Shareholders.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

65. There are two issues to be decided on this cross-motion:

(a) whether Growthworks' mini-trial proposal meets the test for bifurcation; and

(b) whether an expedited trial of all liability issues should be ordered.

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[42] Amended Statement of Allen-Vanguard dated June 11, 2013, para. 6, Motion Record of Allen-Vanguard, pp. 278-279; Reply of Allen-Vanguard dated August 22, 2013, para. 36, Motion Record of Allen-Vanguard, p. 364.
[43] Sanction Order dated December 16, 2009, Cross-Motion Record of Growthworks, pp. 602-629.

I. GROWTHWORKS' CROSS-MOTION FOR AN ORDER BIFURCATING THE TRIAL SHOULD BE DISMISSED

66. Contrary to the submissions of Growthworks and the Offeree Shareholders, there is no free standing right to bifurcate certain liability issues in a mini-trial by splitting those issues from the broader assessment of liability and damages. Growthworks' CCAA proceedings have nothing to do with the Allen-Vanguard Proceedings.

67. Growthworks has not met the test for bifurcation, either pursuant to Rule 6.1.01 of the *Rules of Civil Procedure* or under the inherent jurisdiction of this Court.

68. The *Rules of Civil Procedure* mandate that a court may only bifurcate issues in a proceeding with the consent of the parties:

> **SEPARATE HEARINGS**
>
> **6.1.01** With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages. O. Reg. 438/08, s. 9.[44]

69. Watson and McGowan's text provides the context for understanding Rule 6.1.01:

> This Rule, introduced in 2010, permits separate hearings on different issues, such as liability and damages, provided the parties consent.
>
> On the issue of separate hearings, Justice Osborne recommended that the Civil Rules Committee (CRC) "should consider addressing bifurcation in a rule that would permit an order for bifurcation to be made on motion by any party or on the court's own initiative, after hearing from the parties. Any rule permitting bifurcation could reference some or all of the 14 factors listed in *Bourne v. Saunby*" (1993), 38 O.R. (3d) 555, [1993] O.J. No. 2606 (Gen. Div.). **The CRC**

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[44] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Schedule B.

> **did not accept this recommendation and the new rule requires the consent of the parties to the making of such an order: rule 6.1.01.**[45] [Emphasis added]

70. The Court of Appeal reiterated this history in its decision of *Kovach (Litigation guardian of) v. Kovach*:

> when the Rules Committee enacted the new rule governing separate hearings, it placed it in a part of the rules far removed from case management. Rule 6.1.01 - effective January 1, 2010 - is the first time a rule speaking to bifurcation has been promulgated. It signals that, in the opinion of the Rules Committee at least, the bifurcation of a trial, jury or non-jury, is not generally a good idea unless the parties consent.[46]

71. The case law on bifurcation preceding the enactment of Rule 6.1.01, which relies upon the inherent jurisdiction of courts to control their processes, evidences a similarly high test. As Justice Shaughnessy observed in *Mazza v. Smith*:

> The case law supports the basic right of a litigant to have all issues resolved in a single trial and that a split trial should be ordered only in the "clearest of cases" (*Elcano Acceptance Ltd et al v Richmond, Richmond, Stambler & Mills* (1986) 55 O.R. (2d) 56 (C.A.); *Sempecos v State Farm Fire & Casualty Co.* (2002) 29 CPC (5th) 99 (Div. Ct.) affirmed (2003) 38 CPC (5th) 64 (C.A.). There is also jurisprudence which suggests that the Court will be slow to exercise its jurisdiction and bifurcate issues for trial when one party objects and severance might cause problems. (*Elcano supra* and *Mitchell v Reed Estate* (1995) 36 CPC (3rd) 195 (Ont. Gen Div).
>
> The onus is on the party seeking bifurcation to demonstrate "an exceptional case" which means that the moving party has to meet a very high burden that the law requires for a bifurcation order. (*Kovach v Kovach*; [2009] O.J. No. 150, Court file number 228/08, released January 15, 2009 (Ont. Div. Ct).[47]

72. In this respect, Justice Shaughnessy was citing the seminal case of *Elcano Acceptance* in which the Court of Appeal held that:

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[45] Garry D. Watson, Q.C. and Michael McGowan, Ontario Civil Practice 2014, Thomson Canada Limited (2013) at p. 358, Authorities, Tab 4.

[46] *Kovach (Litigation guardian of) v. Kovach*, [2010] O.J. No. 643 at para. 33 (C.A.), Authorities, Tab 5.

[47] *Mazza v. Smith*, [2009] O.J. No. 283 at paras. 26-27 (S.C.J.), Authorities, Tab 6.

> ...since it is a basic right of a litigant to have all issues in dispute resolved in one trial [the power to order bifurcation] must be regarded as a narrowly circumscribed power... There is also the judicial admonition of Meredith C.J.C.P. in *Waller v. Independent Order of Foresters* (1905), 5 O.W.R. 421 at p. 422:
>
> > "Experience has shewn that seldom, if ever, is any advantage gained by trying some of the issues before the trial of the others is entered upon ... ".
>
> The power should be exercised, in the interest of justice, only in the clearest cases. We would think that a court would give substantial weight to the fact that both parties consent to the splitting of a trial, if this be the case. On the other hand, a court should be slow to exercise the power if one of the parties, particularly, as in this case, the defendant (see *Emma Silver Mining Co. v. Grant* (1878), 11 Ch. D. 918 at p. 928), objects to its exercise.[48]

73. This approach is consistent with Justice Iacobucci's admonition, on behalf of a unanimous Supreme Court of Canada, that "litigation by installments" should be avoided.[49]

74. Allen-Vanguard does not consent to bifurcating the issues proposed by the Offeree Shareholders from the broader assessment of liability. Allen-Vanguard will, however, consent to a bifurcation of liability and damages.

75. There is no good reason to bifurcate the liability issues which have been cherry-picked by the Offeree Shareholders. They are part and parcel of the broader assessment of liability and cannot be hived off as discreet issues. In this respect, the circumstances are analogous to those in *Digregorio v. Brick and Allied Craft Union of Canada, Local 29*, where the Court of Appeal held:

> While the appellant wishes to hive off the issue of termination and be permitted to pursue that through the courts, the factual matrix makes it clear that the termination was part and parcel of the ongoing dispute with the result that the essential nature of the dispute does indeed relate to the duties of fair representation and fair refusal. A full and generous reading of the Reply does nothing to alter this conclusion.

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[48] *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*, [1986] O.J. No. 578 at para. 11 (C.A.), Authorities, Tab 7.

[49] *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 at para. 90, Authorities, Tab 8.

> Moreover, this court has previously indicated that the unnecessary bifurcation of proceedings flowing out of the same factual matrix is to be avoided: see *A.C. Concrete Forming v. The Residential Low Rise Forming Contractors Association of Metropolitan Toronto and Vicinity*, 2008 ONCA 864 (CanLII) , at para. 26.[50]

76. Bifurcating the liability issues proposed by the Offeree Shareholders would not result in any saving of time and resources, and certainly not a sufficient amount to justify infringing on Allen-Vanguard's "basic right"[51] to have all issues in a dispute resolved in one case, particularly where Allen-Vanguard objects to bifurcation. This is not an "exceptional case",[52] as Growthworks must demonstrate it is, to justify bifurcation.

77. This Court should not accept the Offeree Shareholders' pejorative characterization of Allen-Vanguard's actions in this litigation. Allen-Vanguard and its counsel have been focused on one thing throughout – securing a trial date and having its day in court.

78. Growthworks and the other Offeree Shareholders allege in their Facta that Allen-Vanguard's claims are "utterly baseless"[53] and "ill-fated"[54]. If the Offeree Shareholders believe that to be so obvious, a claim without merit, then that is what a trial is for and they should embrace an expedited trial of all liability issues.

79. The Offeree Shareholders' actions belie their oft repeated statements to the effect that Allen-Vanguard's claims are unmeritorious. Indeed, the Offeree Shareholders have focused their energy on interlocutory motions (this cross-motion and the summary judgment motion they sought

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[50] *Digregorio v. Brick and Allied Craft Union of Canada, Local 29*, [2012] O.J. No. 5066 at paras. 2-3 (C.A.), Authorities, Tab 9.
[51] *Mazza v. Smith*, [2009] O.J. No. 283 at para. 26 (S.C.J.), Authorities, Tab 6.
[52] *Mazza v. Smith*, [2009] O.J. No. 283 at para. 27 (S.C.J.), Authorities, Tab 6.
[53] Factum of Growthworks dated January 31, 2014, para. 68.
[54] Factum of Growthworks dated January 31, 2014, para. 80.

to bring in Ottawa) in an attempt to exclude the crucial evidence of the former management of MES from being heard and considered by the Court.

80. The interpretation of the Share Purchase Agreement must be considered within the context of the whole Transaction and with respect to all the provisions of the Share Purchase Agreement. The Court of Appeal for Ontario has summarized the basic principles of commercial contractual interpretation as follows:

> Broadly speaking, however – as this Court noted in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, (2007), 85 O.R. (3d) 254, at para. 24 – a commercial contract is to be interpreted,
>
> > (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
> >
> > (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
> >
> > (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
> >
> > (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity.[55]

81. Simply put, the Share Purchase Agreement must be interpreted so as to give effect to the intention of the parties at the time when the Agreement was entered into.[56] However, the trial judge interpreting the Share Purchase Agreement will likely need to consider the entire factual matrix surrounding the making of the contract.

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[55] *The Plan Group v. Bell Canada*, [2009] O.J. No. 2829 at paras. 37 and 170 (C.A.), Authorities, Tab 10.

[56] *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance*, [1980] 1 S.C.R. 888 at p. 901, Authorities, Tab 11.

82. In these circumstances, the interpretation of the Share Purchase Agreement as it relates to the Offeree Shareholders' liability to Allen-Vanguard for MES' breaches of representations and warranties cannot be separated from their liability to Allen-Vanguard for MES' fraudulent misrepresentations.

83. It would be unfair and unrealistic to expect the judge hearing the mini-trial proposed by the Offeree Shareholders to consider whether the Offeree Shareholders are liable for an amount in excess of the Indemnification Escrow Amount without also considering whether the Offeree Shareholders are liable for the breaches of representations, warranties and covenants committed by MES. The issues are intertwined as they will necessarily involve determining how Allen-Vanguard would ever be entitled to a remedy under the Share Purchase Agreement if its claims for MES' fraud were to be pursued against MES and not the Offeree Shareholders as the Offeree Shareholders contend. These questions cannot be isolated and considered as separate or distinct legal issues.

84. The Offeree Shareholders rely upon the Supreme Court of Canada's recent decision in *Hryniak v. Mauldin*[57] to suggest that there is now a free standing right to seek summary adjudication of certain issues in the air.

85. However, the Offeree Shareholders have ignored the Supreme Court's analysis in *Hryniak v. Mauldin*, which reviews the legislative history of Rule 20 and places great emphasis on the choices made by the legislature in light of the *Civil Justice Report Project* report prepared by former Ontario Associate Chief Justice Coulter Osborne, Q.C. in 2007 (the "Osborne Report").[58]

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[57] *Hryniak v. Mauldin,* 2014 SCC 7, Authorities, Tab 12.
[58] *Hryniak v. Mauldin,* 2014 SCC 7 at paras. 39-41, Authorities, Tab 12.

Indeed, the Offeree Shareholders ignore Rule 6.1.01 (which was introduced in 2010 following the Osborne Report) and the Civil Rules Committee's decision to reject the recommendation made in the Osborne Report to create a new free standing right to seek bifurcation absent consent.[59]

86. In any event, in *George Weston Limited v. Domtar Inc.*, Justice Brown held that this is precisely the type of case in which a summary judgment motion was not appropriate:

> From the materials filed I have very strong reservations about whether Weston's motion is an appropriate candidate for summary judgment. **First, Weston's action and motion engage important issues of contractual interpretation which bear very significant financial consequences.** If the court accepts Weston's claim, then damages indeed will amount to $110 million by virtue of the terms of the SPA. **Given such stakes the court deciding the merits of Weston's claim will want to have the fullest appreciation of all factual and legal issues before making its decision.** I question whether a summary proceeding under Rule 20 brought prior to examinations for discovery is a proportionate mechanism to adjudicate the claims asserted by Weston. **Further, section 2.3 of the SPA is a complex price adjustment clause and, from the factums filed by the parties, it certainly appears that its application to the Weyerhauser Arrangement will require some intricate contractual interpretation.** [60] [Emphasis added]

87. The likelihood of confusion, objection and uncertainty on the proposed mini-trial are a virtual certainty. Objections to the admissibility of evidence of witnesses who testify as to the parties' intentions, of the kind already made by the Offeree Shareholders at paragraph 35 of their Factum, will certainly arise, likely on both sides, depending on how the parties define or analyze what is relevant. Indeed, the Offeree Shareholders have already complained that Allen-Vanguard's evidence is inadmissible as to the intentions of the parties. Based on the "expected" evidence submitted by the Offeree Shareholders, it will likely draw a similar objection from Allen-Vanguard.

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[59] Garry D. Watson, Q.C. and Michael McGowan, Ontario Civil Practice 2014, Thomson Canada Limited (2013) at p. 358, Authorities, Tab 4.

[60] *George Weston Ltd v. Domtar Inc.*, 2012 ONSC 5001 at para. 77 (S.C.J.), Authorities, Tab 13.

88. The Offeree Shareholders' "expected" evidence from Robert Chapman, a lawyer at McCarthy Tétrault who acted for both the Offeree Shareholders and MES, also raises a host of evidentiary issues.

89. The proposed mini-trial will invite motions on refusals, production, and motions to strike affidavit evidence. Delays and costs will proliferate. The judge hearing the matter will be constrained and concerned with the record and the parties' rights.

90. Only a trial judge can sort out the evidentiary issues arising from the line between factual matrix, intention and purpose, and parol evidence going to explain an apparent ambiguity.

91. Justice Brown has explained why a motion for summary judgment would be inappropriate in these circumstances:

> Given that Weston's summary judgment motion will put in play a dispute about the admissibility of evidence and the contested evidence is characterized by material disputes, it is worth recalling the approach taken by the trial judge in *Kentucky Fried Chicken of Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.*, to the issue of the admissibility of extrinsic evidence on the issue of contractual interpretation. In that case at the conclusion of opening statements the plaintiff moved to exclude as inadmissible any evidence of the negotiations leading up to the agreement in dispute and evidence of either party's subjective intention. The defendants opposed the motion on the grounds that it was premature, that the court should not determine the issue of parol evidence in a vacuum and, in any event, the law was in an unsatisfactory state and it was difficult to determine what evidence would be permissible as forming part of the "factual matrix". In the result the trial judge reserved his decision until the end of trial because:
>
> > ...until I had heard all of the factual evidence I believed that it was premature to give a decision, even if I was so inclined, no matter how desirable it might have been to shorten the trial. There were no reported cases cited where blanket types of evidence were ruled out in advance. I stated that to rule on part only of the motion might create arguments during trial as to what was covered or not covered by my ruling. I stated that by reserving the decision, all of the evidence would be available for consideration by me at the end of the trial and, in the event that I should err in

> my conclusion, by an appellate court. The risk of an erroneous ruling on blanket areas of evidence is far greater than a ruling on an isolated question. The admission of evidence can create no harm.
>
> Such an approach affords the trier of fact the best opportunity to gain the fullest appreciation of the contested evidence and its relevance, if any, to the issues requiring adjudication. Yet, such an approach would be very difficult to employ on a summary judgment motion where disputes exist about which evidence goes to the "factual matrix" and the contested evidence itself is marked by disputed facts. Further, in the circumstances of this case, credibility findings would have to be made in the absence of an extensive documentary record which could act as a reliable yardstick to make such findings.[61]

92. There is also a significant risk that the proposed mini-trial will result in inconsistent findings. Indeed, witnesses will be called to testify on more than one occasion on overlapping issues and credibility issues are likely to arise.

93. There is no doubt that the proposed mini-trial would involve multiple witnesses, many volumes of documents, attempts to introduce expert evidence, lengthy cross-examinations, and would consume massive costs and scarce judicial resources, all of which can and should be avoided, particularly when all liability issues are ready to proceed to trial.

94. The unchallenged evidence is that the proposed mini-trial will take approximately 3 weeks while a trial of all liability issues (including the issues to be determined on the proposed mini-trial) would take approximately 6-7 weeks.[62]

95. In addition, even if the Offeree Shareholders were to be successful on the main issue for the proposed mini-trial, it will not finally dispose of the matter as the underlying issues are inter-related and a second trial is inevitable.

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[61] *George Weston Limited v. Domtar Inc.*, 2012 ONSC 5001, at paras. 83 and 84 (S.C.J.), Authorities, Tab 13.
[62] Second Luxton Affidavit, para. 10, Responding Motion Record of Allen-Vanguard, p. 3.

II. ALL LIABILITY ISSUES SHOULD PROCEED TO TRIAL EXPEDITIOUSLY

96. The liability issues in the Allen-Vanguard Proceedings are ready to proceed to trial.[63]

97. The most efficient way of adjudicating this dispute and the method that would enable Growthworks to emerge from these CCAA proceedings in a timely fashion, would be to separate damages from liability issues in this case, and secure an early date for the liability trial.[64] It would be far more efficient to try all liability issues in a 6-7 week trial than to proceed with the mini-trial on a fraction of the liability issues as proposed by the Offeree Shareholders.[65]

98. If the Court were to order a bifurcated trial in this manner, no further Examinations for Discovery would be required, the Offeree Shareholders would not be required to respond to Allen-Vanguard's damages report, and there should be no further disputes over documentary production.[66]

99. The proposed mini-trial cannot possibly be completed in one week as suggested by the Offeree Shareholders' counsel, who has consistently underestimated the amount of time required to prepare and advance the Allen-Vanguard Proceedings.[67] In addition, the cost to Allen-Vanguard to prepare for and conduct the mini-trial alone would be in the hundreds of thousands of dollars.[68] Much of that cost will then have to be duplicated to prepare for and conduct the subsequent trial.[69]

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[63] Second Luxton Affidavit, paras. 33 and 37, Responding Motion Record of Allen-Vanguard, pp. 9-10.
[64] Second Luxton Affidavit, para. 32, Responding Motion Record of Allen-Vanguard, p. 9.
[65] Second Luxton Affidavit, paras. 10 and 13, Responding Motion Record of Allen-Vanguard, p. 3.
[66] Second Luxton Affidavit, para. 36, Responding Motion Record of Allen-Vanguard, p. 9.
[67] Second Luxton Affidavit, paras. 9-10, Responding Motion Record of Allen-Vanguard, p. 3.
[68] Second Luxton Affidavit, para. 11, Responding Motion Record of Allen-Vanguard, p. 3.
[69] Second Luxton Affidavit, para. 12, Responding Motion Record of Allen-Vanguard, p. 3.

100. The only outstanding interlocutory steps to be taken in the Allen-Vanguard Proceedings are in respect of damages.[70] Further, it is the Offeree Shareholders, not Allen-Vanguard, that seek to extend the interlocutory motions in this litigation.[71]

101. In all of the circumstances, this Court should direct an expedited trial of all liability issues in the Allen-Vanguard Proceedings.

PART IV - ORDER REQUESTED

102. Allen-Vanguard respectfully requests:

(a) an Order dismissing this cross-motion, with costs; and

(b) an Order directing the trial of all liability issues on an expedited basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of February, 2014.

Ronald G. Slaght, Q.C.

Eli S. Lederman

Ian MacLeod

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[70] Second Luxton Affidavit, para. 33, Responding Motion Record of Allen-Vanguard, p. 9.
[71] First Luxton Affidavit, paras. 44-47, Motion Record of Allen-Vanguard, pp. 20-21.

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Lawyers for Allen-Vanguard Corporation

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.*, [1998] O.J. No. 4368 (C.A.); *Kentucky Fried Chicken Canada, a Division of Pepsi-Cola Canada Ltd. v. Scott's Food Services Inc.*, [1997] O.J. No. 3773 (Gen. Div.)

2. *Allen-Vanguard Corp. v. L'Abbé*, [2013] O.J. No. 1074 (S.C.J. Mast.)

3. *Allen-Vanguard v. L'Abbé*, [2013] O.J. No. 2324 (S.C.J.)

4. Garry D. Watson, Q.C. and Michael McGowan, Ontario Civil Practice 2014, Thomson Canada Limited (2013)

5. *Kovach (Litigation guardian of) v. Kovach*, [2010] O.J. No. 643 (C.A.)

6. *Mazza v. Smith*, [2009] O.J. No. 283 (S.C.J.)

7. *Elcano Acceptance Ltd. et al. v. Richmond, Richmond, Stambler & Mills*, [1986] O.J. No. 578 (C.A.)

8. *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629

9. *Digregorio v. Brick and Allied Craft Union of Canada, Local 29*, [2012] O.J. No. 5066 (C.A.)

10. *The Plan Group v. Bell Canada*, [2009] O.J. No. 2829 (C.A.)

11. *Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance*, [1980] 1 S.C.R. 888

12. *Hryniak v. Mauldin*, 2014 SCC 7

13. *George Weston Ltd v. Domtar Inc.*, 2012 ONSC 5001 (S.C.J.)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

SEPARATE HEARINGS

6.1.01 With the consent of the parties, the court may order a separate hearing on one or more issues in a proceeding, including separate hearings on the issues of liability and damages.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED, AND IN THE MATTER OF GROWTHWORKS CANADIAN FUND LTD.

Court File No. CV-13-10279-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

FACTUM OF ALLEN-VANGUARD CORPORATION
(Cross-Motion Re: Allen-Vanguard Mini-Trial)

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